In making a proper inspection of this stairway an inspector should look at the bearings, treads, risers and hoists (stringers); he should see whether any treads were split, should examine the thickness of the treads, the size of nails holding the treads, and whether the treads were properly and securely nailed to the stringers, should take into account the 1½ inch overhang, and whether the stairway was solid (R. 215, 216, 217, 218, 221, 170, 172, 173, 174). *An overhang of as much as 1½ inches in this split and broken 4th tread was 'dangerous'* (R. 221). *Any competent contractor ought to have seen that this split tread 'was weak'* (R. 221).

Notwithstanding the foregoing facts, the undisputed evidence is that defendant entirely failed to make any repair whatever to the unsafe 4th tread (R. 248, 261, 264, 271). Butterworth admitted that he possibly overlooked its condition (R. 121). King failed to see the split condition of the tread (R. 173), although the split had been there for years (R. 130) and was so wide as to have gathered lint scrapings (R. 202) and paint (R. 201, 214-15).

Reasonable construction practice would be, if it was desired to use the two halves of the broken 4th tread, to nail a two-by-four, or two-by-six board underneath the broken tread to hold it together (R. 219). King was employed to inspect and discover defects during the progress of the work, for purpose of removing all unsafe conditions and was present and at least attempted to so cover the basement stairs (R. 169-179, 180-186).

B.

Statement of the Jurisdiction of This Court.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925, c.229, Sec. 1, 43 Stat. 938 (28 U. S. Code, Sec. 347(a)), and under the same Act c.229, Sec. 8, 24 Stat. 940 (28 U. S. Code, Sec. 350).

The case properly originated in the United States District Court under Sec. 24(1) of the Judicial Code as amended by the Act of March 3, 1911, c.231, Sec. 24, 36 Stat. 1091 (28 U. S. Code, Sec. 41(1)) and the Act of February 13, 1925, c.229, Sec. 12, 43 Stat. 941 (28 U. S. Code, Sec. 42), as a proceeding brought against a corporation incorporated under an Act of Congress wherein the government of the United States is the owner of more than one-half of its capital stock, with authority to sue and be sued in any court of competent jurisdiction, Federal or State, Act of June 13, 1933, c.64, Sec. 4, 48 Stat. 129; Apr. 27, 1934, c.168, Secs. 1(a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c.847, Secs. 506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c.150, Secs. 10-16, 17 (a), 49 Stat. 296-297, (12 U. S. Code, Sec. 1463 (a) and (b)).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered on January 13, 1942 (R. 343). Plaintiff, as appellee, filed a petition for rehearing on January 28 (R. 345-356), which the Circuit Court of Appeals denied on February 2, 1942 (R. 357). The Circuit Court of Appeals has stayed its mandate until April 12, 1942, and pending the filing of a petition for certiorari, evidenced by a certificate thereof by the Clerk of this Court, on or before April 12 (R. 358, and certificate of the Clerk of the Circuit Court of Appeals filed with the petition herein). This petition for certiorari and supporting transcript of the record are filed prior to April 6, 1942, with request that the Clerk of this Court send to the Clerk

of the Circuit Court of Appeals certificate of the filing thereof.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this Court.

The case is an action for damages for personal injuries caused by the negligent failure of defendant landlord to repair the fourth tread of the basement stairway of rented premises, when defendant had undertaken to repair the stairway (R. 1-4).

The Circuit Court of Appeals for the Eighth Circuit reversed (R. 335-344) a judgment for plaintiff rendered upon a trial in the United States District Court without a jury (R. 10-11, 7-8, 309-310). The Circuit Court of Appeals ruled that under the Missouri law plaintiff could recover from the defendant in tort only on account of negligence of defendant in *acts of actually attempted repair to the fourth tread* of the stairway (R. 340-341), thereby ruling in conflict with applicable Missouri decisions to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them* (*Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503; *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62).

The Circuit Court of Appeals also ruled that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway (R. 340), *contrary* to the findings of the District Court (R. 307-8), and practically undisputed evidence (R. 189, 193, 305, 302-3, 169-175, 180-186), that defendant landlord *assumed to repair the entire stairway.*

The Circuit Court of Appeals also ruled that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread (R. 341, 343), *contrary* to the finding of the District Court (R. 308), and practically undisputed evidence (R. 119-122, 130, 167, 170-175, 193, 200-202, 211, 214-15, 215-222, 248, 256-6, 273-5, 278-285, 296, 308) that defendant in fact negligently, failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition.

In so ruling as to the facts, in both particulars, the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that: "Findings of fact (upon a trial of the facts without a jury) shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In so ruling the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of the other Circuit Courts of Appeals upon the effect of the findings of the District Court, supported by substantial evidence.

(4) Cases believed to sustain the jurisdiction of this court. Decision of question of defendant's negligence in conflict with controlling Missouri decisions.

Lasky v. *Rudman,* 337 Mo. 555, 560, 85 S. W. (2d) 501, 503.

Shaw v. *Butterworth,* 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60.

Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U. S. 381, 396.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 177.

Six Companies of California v. *Joint Highway District*, 311 U. S. 180, 188.

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236.

Stoner v. *New York Life Ins. Co.*, 311 U. S. 464, 467.

Royal Indemnity Co. v. *U. S.*, 313 U. S. 289, 296.

Just v. *Chambers*, 312 U. S. 383, 387.

Board of Commissioners v. *U. S.*, 308 U. S. 343 352.

U. S. v. *Guaranty Trust Co.*, 293 U. S. 340.

Brown v. *U. S.*, 263 U. S. 78, 86.

Seaboard Air Line Ry. Co. v. *U. S.*, 261 U. S. 299, 306.

O'Sullivan v. *Felix*, 233 U. S. 318.

McClaine v. *Rankin*, 197 U. S. 154.

Compare *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942.

Setting aside findings of fact of the District Court amply supported by the evidence in violation of Rule 52(a), Federal Rules of Civil Procedure, involving a question which should be settled by this Court, departure from course of judicial proceedings calling for an exercise of this Court's power of supervision, and in conflict with decisions of other Circuits.

McCaughn v. *Real Estate Company*, 297 U. S. 606, 608.

The Josephine & Mary, 1 Cir., 120 F. (2d) 459.

Cray, McFawn & Co. v. *Hegarty, Conroy & Co.*, 2 Cir., 109 F. (2d) 443.

Commonwealth Trust Co. of Pittsburgh v. *Reconstruction Finance Corporation*, 3 Cir., 120 F. (2d) 254.

Smith v. *U. S.*, 3 Cir., 121 F. (2d) 692, affirming 34 F. Supp. 947.

Buckley v. *Christmas*, 4 Cir., 121 F. (2d) 323, *certiorari* denied 62 S. Ct. 180.

Chalk v. *U. S.*, 4 Cir., 114 F. (2d) 207, *certiorari* denied 312 U. S. 679.

Mississippi Valley Timber Co. v. *Mengel Co.*, 5 Cir., 112 F. (2d) 947.

Van Auken v. *Second Nat. Bank & Trust Co. of Saginaw*, 6 Cir., 117 F. (2d) 938, *certiorari* denied 313 U. S. 593.

Gary Theatre Co. v. *Columbia Pictures Corporation*, 7 Cir., 120 F. (2d) 891.

Maier v. *Continental Oil Co.*, 7 Cir., 120 F. (2d) 237, *certiorari* denied 62 S. Ct. 101.

Gates v. *General Casualty Co., of America*, 9 Cir., 120 F. (2d) 925.

Maryland Casualty Co. v. *Stark*, 9 Cir., 109 F. (2d) 212.

Mid-Continent Pipe Line Co. v. *Whiteley*, 10 Cir., 116 F. (2d) 871.

Thatenhorst v. *U. S.*, 10 Cir. 119 F. (2d) 567.

Consolidated Realty Corporation v. *Dunlop*, App. D. C., 114 F. (2d) 16, 72 App. D. C. 273.

C.

The Questions Presented.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts* of *actual attempted repair* to the *fourth tread* of the stairway, has the Cir-

cuit Court of Appeals decided an important question of local law in a way in conflict with the applicable local decisions, *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, and *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62?

(2) In ruling the question of defendant's negligence contrary to the Missouri decisions, has the Circuit Court of Appeals decided a federal question in a way in conflict with *Erie R. R. Co.* v. *Tompkins* and other applicable decisions of this Court? Since federal jurisdiction of plaintiff's case is based upon the fact that defendant is a federal corporation, has the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court?

(3) In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, has the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness?" And has the Circuit Court of Appeals thereby decided an important question of federal law which has not been, but should be, settled by this Court, or has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, or rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

(4) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the

fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact, negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, has the Circuit Court of Appeals violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness?" And has the Circuit Court of Appeals thereby decided an important question of federal law which has not been, but should be, settled by this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; or rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court?

D.

Reasons Relied On For The Allowance Of The Writ.

(1) In ruling that under the Missouri law, plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts of actual attempted repair* to the *fourth tread* of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions, *Lasky* v. *Rudman*, 337 Mo. 555, 560, 84 S. W. (2d) 501, 503, and *Shaw* v. *Butterworth*, 327 Mo. 622, 631, 38 S. W. (2d) 57, 62, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to *discover* and *repair* defective conditions and liable for injuries resulting from failure to perform said duty, *regardless*

of whether the landlord had *actual knowledge* of the defects or actually *attempted to remedy them.*

(2) In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with *Erie R. R. Co.* and other applicable decisions of this Court. Defendant's negligence is not a federal question. Since federal jurisdiction of plaintiff's case is based upon the fact that defendant is a federal corporation, the precise question decided by the Circuit Court of Appeals is an important question of federal law which has not been, but should be, settled by this Court.

(3) In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court and the evidence that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness," the Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

(4) In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negli-

gently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

CONCLUSION.

Petitioner respectfully avers that the reversal of plaintiff's judgment is based upon the decision by the Circuit Court of Appeals of an important question of Missouri law contrary to the applicable Missouri decisions, fortified by rulings of the Court in disregard of findings of fact of the District Court which were amply supported by the evidence, in violation of Rule 52(a) of the Federal Rules of Civil Procedure.

WHEREFORE, your petitioner prays that a writ of *certiorari* issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 12108, *Civil, "Home Owners' Loan Corporation, Appellant,* v. *Mae Huffman, Appellee,"* to

the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of *certiorari;* and your petitioner prays that she may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law; and your petitioner will ever pray.

Mae Huffman,
Petitioner.

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